



U.S. Department
of Transportation
Federal Highway
Administration



LEGAL SUFFICIENCY ENHANCEMENT INITIATIVE (LSEI)



Summit Session Objectives

- Inform FHWA stakeholders about LSEI
- Engage FHWA stakeholders to work with FHWA to implement LSEI



Agenda

- Legal Sufficiency
- LSEI Core Elements
- New Procedures
- New Tools
- Results



LSEI Goals

- Use enhanced coordination to
 - Expedite the environmental review process
 - Shorten the overall project delivery time
- Avoid delays in legal sufficiency determinations for FEISs and Section 4(f) Evaluations



What Is Legal Sufficiency?

- All elements of the law are addressed adequately in the environmental document
- Important goal for all environmental documents
- Determination required for FEISs and Section 4(f) Evaluations



NEPA Legal Sufficiency

- Focuses on adequacy of discussion of key elements such as
 - Purpose and need
 - Alternatives screening and analysis
 - Environmental resources and impacts analyzed
 - Interagency coordination
 - Public involvement
 - Responses to comments



Section 4(f) Legal Sufficiency

- **Focuses on whether the document**
 - **Sets forth the appropriate analyses in a clear and logical manner**
 - **Demonstrates that Section 4(f) standards are satisfied**



What Are Core LSEI Elements?

- Enhanced communication and coordination
- Early problem identification and resolution
- Prioritization of issues for better resource allocation
- Bottom line: More effective environmental review process



What Is Early Involvement?

- **FHWA Counsel is part of the Project Team**
 - Consults on key project decisions
 - Reviews major documents for legal issues and potential areas of controversy
 - Helps solve problems



How LSEI Shifts the Entry Point for Legal Consultation

Traditional Process



LSEI Early Involvement Process





Early Involvement Benefits: RETRAC



EIS NOI: June 1999
ROD: February 2001
Construction Start: 2002





What Is the State's Role?

- Understand the early involvement initiative
- Decide whether a project is a priority and needs these special resources
- Advise Division of desire for early involvement status
- Submit quality documents to FHWA
- Ensure timely and effective follow-up on FHWA comments



State's Costs and Benefits

- **Costs**
 - Front end loading of staff and consultant time
 - Enhanced oversight of document quality
- **Benefits**
 - Early determination of important project issues
 - Strategic planning for resolving issues
 - Overall time savings and reduced litigation risk
 - No last minute “surprises” from FHWA



Examples: When to Consider Early Legal Involvement

- All EIS projects
- Controversial EA and CE projects
- Projects that “normally required an EIS” but are being processed as an EA or CE
- Projects requiring an individual Section 4(f) Evaluation
- Projects with an economic development, rather than a transportation, purpose and need



Early Involvement Procedures

- **FHWA Counsel will**
 - Help identify and solve potential legal issues
 - Review draft and final documents
 - Categorize comments by importance
 - Solicit a post-comment coordination meeting
 - Provide shorter turn-around on final environmental document reviews



Project Decisions That Can Benefit from Consultation

- Purpose and Need Statement
- Scope of analysis of direct, indirect, and cumulative impacts
- Scope of FHWA NEPA review
- Alternatives screening criteria
- Selection of reasonable alternatives for detailed analysis



Project Decisions That Can Benefit (cont.)

- Responses to external comments on DEISs and FEISs and on controversial or complex EAs
- Section 4(f) determinations
 - Least overall harm
 - An avoidance alternative is not prudent
- Scope and content of the ROD
- Any other decision on a disputed issue that could affect legal sufficiency, or could be the subject of litigation



Early Involvement Benefits: Newtown Pike





New SOPs

- **Prioritizing FHWA Counsel comments to Division**
- **Soliciting coordination and planning meeting for responses to FHWA comments**
- **15-day turn around on final legal sufficiency review where final document addresses prior comments**



Categorize Legal Sufficiency Comments

- FHWA Counsel will categorize each comment by its level of importance, indicating which comments
 - Must be satisfactorily addressed in order to find the document legally sufficient (#1)
 - Are important to overall document quality (#2)
 - Are editorial or optional (#3)



Legal Sufficiency Coordination Meeting

- FHWA Counsel will encourage a post-comment coordination meeting
- Opportunity to
 - Review, discuss, and clarify comments
 - Prepare an action plan and schedule for the revisions in response to comments



Expedited Legal Sufficiency Review of Final Documents: 15-Day Rule

- **Successful early involvement means**
 - Problems identified in draft documents are resolved before final documents are sent to FHWA Counsel
 - FHWA Counsel then can make a final legal sufficiency determination within 15 calendar days



Questions?



New Tools

- FHWA Counsel LSEI Questions and Answers
- Publications
 - White Paper on Alternatives Analyses
 - “Avoiding Common Trouble Spots with Environmental Documents”
- Available online at
www.fhwa.dot.gov/everydaycounts/projects/toolkit/enhancements.cfm/



Alternatives Analyses White Paper

- Principles FHWA Counsel will apply when reviewing NEPA alternatives analyses
- Strategies to reach an appropriate number of alternatives to evaluate in detail
- Resources



Common Trouble Spots

- Most common problems with environmental documents
- Measures to help avoid the problems



Purpose & Need

- Common problems
 - Too narrow, predetermines outcome, or
 - Too broad, nearly any solution will meet purpose & need



Purpose & Need (cont.)

- *Davis v. Mineta* court upheld:
“...Improve the functionality of the 11400 South corridor as an important local and regional travel corridor... Enhance access and mobility throughout the project area ... Help accommodate the regional traffic demand for east-west travel across the southern end of the Salt Lake Valley...”



Purpose & Need (cont.)

- But inclusion of specific solution (in yellow) would have violated NEPA

“...Improve the functionality of the 11400 South corridor as an important local and regional travel corridor **by a new crossing of the Jordan River**.... Enhance access and mobility throughout the project area ... Help accommodate the regional traffic demand for east-west travel across the southern end of the Salt Lake Valley...”



Range of Alternatives

- **Common problem**
 - Analysis does not include a reasonable range of alternatives



Range of Alternatives (cont.)

- *Davis v. Mineta* – Inadequate, no consideration of combined alternatives (e.g., transit and TSM components)
- *Jones v. Peters* – Same project, cured *Davis* problems by including “combination” alternatives in original pool before screening down to 5 alternatives for detailed analysis
- *Corridor H* – Tier 1 corridor-level consideration of 5 alternatives with detailed explanation of reasons for rejection held adequate to limit Tier 2 detailed analysis to build-no build



Example: Changes in Law, Policy, or Guidance

- Common problem
 - Evolving science and policy results in changed requirements



Changes in Law, Policy, or Guidance (cont.)

- Greenhouse gas emissions and climate change
 - *Yesterday*: Lack of GHG discussion acceptable
 - *Today*: EA or EIS not legally sufficient without at least acknowledging the issue of climate change
 - *Tomorrow*: Type and scope of required analysis will be better defined by CEQ, FHWA, and the courts



Example: Problematic Inconsistencies or Assumptions

- Common problems
 - Use of inconsistent information or assumptions is not explained, or the explanation is not supported by facts, logic, or law



Problematic Inconsistencies or Assumptions (cont.)

- *Sierra Club, Illinois Chapter v. USDOT - FEIS* inadequate
 - Used same land use, population, and employment forecasts for both build and no build scenarios
 - Described project as needed to reduce travel times, but did not analyze travel times
 - After FEIS, new report suggested FEIS underestimated growth in the build scenario
 - No explanation for absence of correct information on project's growth-inducing effects



Expected LSEI Benefits

- Shortens environmental review process by
 - Facilitating early identification and resolution of problems
 - Reducing overall environmental review time and costs
 - Reducing project controversy and litigation risk



Expected LSEI Outcomes

- Expedited project delivery
- Better information to the public and other agencies
- Fully informed FHWA NEPA and Section 4(f) decisions



Recap: What You Can Do

- Understand the early involvement initiative
- Decide whether a project is a priority and needs these special resources
- Advise Division of desire for early involvement status
- Submit quality documents to FHWA
- Ensure timely and effective follow-up on FHWA comments



Final Questions or Comments?

Thank you!